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No. 92-1258

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-v-

VINSON MAURICE NANCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE STANDARD SET FORTH IN MICHIGAN v. LONG, 462 US 1032 (1983), REQUIRED THE SUPPRESSION OF EVIDENCE THAT WAS THE FRUIT OF AN ILLEGAL SEARCH.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent VINSON MAURICE NANCE requests that this Honorable Court deny Petitioner the STATE OF MICHIGAN's Petition for Writ of Certiorari to review the Opinion of the Michigan Court of Appeals of the State of Michigan dated April 3, 1992.

ORDERS AND OPINIONS BELOW

Respondent relies upon the Orders and Opinions submitted in the Petitioner's Petition for Writ of Certiorari and its Appendices.

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JURISDICTION

This case involves a federal question, Defendant's right to be free from an illegal search. The Court of Appeals based its decision upon the principles set forth in Michigan v. Long, 463 US 1032 (1983).

COUNTER-STATEMENT OF THE CASE

Plaintiff/Petitioner has mischaracterized many of the facts in this case. Defendant/Respondent requests this Court's patience in permitting Respondent the opportunity to set forth the facts available to the trial court when it addressed the issue of suppression.

Procedural Background

Defendant/Respondent Vinson Maurice Nance was convicted of carrying a pistol in a motor vehicle (MCL 750.227; MSA 28.424). Mr. Nance appealed his conviction, citing three issues on appeal. In an opinion dated April 3, 1992, a unanimous panel of the Michigan Court of Appeals reversed Mr. Nance's conviction based upon the first issue, search and seizure. The Court did not address Appellee's second and third issues. Plaintiff/Petitioner sought leave to appeal the Court of Appeals' decision in the Michigan Supreme Court; its petition was denied in an order dated October 27, 1992. The issue now before this Court via this Petition for a Writ of Certiorari is whether the Michigan Court of Appeals' decision conflicts with applicable decisions of this Court.

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Facts

On March 15, 1988, Appellee Nance accompanied Ralph Goodwin to the apartment of a mutual friend. They were driving a 1988 Renault which belonged to Goodwin's father. The friend's apartment was located near the intersection of Scotia and Ten Mile in the City of Oak Park (EH is transcript of Evidentiary Hearing, dated October 21, 1988, p. 53). When Nance and Goodwin were preparing to return home, Goodwin apparently indicated that he intended to stop at a nearby store to purchase lottery tickets (EH, pp. 65-66). The mutual friend, in an apparent desire to also purchase lottery tickets, drove to the store in a separate vehicle, a Sazuki (EH, p. 66).

After buying their tickets, Goodwin walked over to his friend's Sazuki, leaving Nance in the passenger seat of the Renault (EH, p. 8). Goodwin entered the friend's vehicle "to say our business, speaking on what we were going to do later on" (EH, pp. 54, 67). While in the friend's vehicle, Goodwin observed a police car enter the parking lot and drive by, apparently looking into the store. Believing that "[t]here must be something going down here," Goodwin decided to leave the area and "get out of their way" (EH, p. 55). Since it was a chilly winter day[1], Goodwin "trotted" back to the Renault (EH, pp. 55, 67). Because

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[1] One of the officers, Officer Rix, testified that it was only 25 degrees out that night (EH, p. 31). Officer Rix also admitted that it would be fair to infer that Goodwin ran from one vehicle to another because of the cold weather (EH, pp. 31-32).

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his license was not valid, he entered the passenger door of the Renault and told Mr. Nance to drive (EH, p. 55).

Officer Calvin Rix and Auxiliary Officer Barry Rose were in the police car. They observed Goodwin enter his friend's vehicle (EH, p. 7). While Goodwin was in the Sazuki, Officer Rix "couldn't tell what they were doing" (EH, p. 10). He then saw Goodwin "run" back to the Renault (EH, pp. 7-10). Officer Rix radioed in that he had witnessed a drug deal and requested back-up (EH, pp. 11, 32). Although they had no radar detector and did not pace the vehicle, the officers perceived that it left the parking lot "at a high rate of speed" (EH, pp. 11, 35, 39; TR is transcript of trial, dated May 10, 1990, p. 81). They also contend that it failed to come to a complete stop before entering the street (EH, p. 12). The officers activated their beacons and pulled the Renault over (EH, p. 13). Mr. Nance, driving the Renault, responded immediately to the officer's indication to pull over. "As soon as I turned it [my beacons] on he abruptly hit the brakes and turned into the driveway" (EH, p. 13). Mr. Nance was never ticketed for speeding. He received a ticket for failing to stop before leaving a parking lot (EH, pp. 33-34), however that ticket was later dismissed (EH, p. 75).

When Mr. Nance pulled over, he pulled into a private driveway (EH, p. 13). Because the gear shift on the Renault is "messed up" and because he was unfamiliar with it, Mr. Nance had difficulty finding neutral, and the car was in reverse momentarily after it pulled over (EH, p. 56). Goodwin leaned over and

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helped Mr. Nance find neutral (EH, p. 56). Officer Rix saw Goodwin lean toward Mr. Nance but could not see what they were doing (EH, p. 14). As the officers approached the Renault, Goodwin reached into a pocket behind the seat to retrieve the car's registration and proof of insurance (EH, p. 57). Officer Rix heard a noise that he perceived to be the slamming of a glove box as he approached the vehicle (EH, p. 14, 37). Although he did not see the glove box open, he contends that he saw Goodwin's hand in the vicinity of the glove box (EH, pp. 14-15, 37). In any case, Appellee Nance produced his license, the car's registration and proof of insurance for the officers (EH, p. 16, 37). The officers never saw Mr. Nance reach for the glove box or otherwise touch the glove box (EH, p. 44; TR, pp. 90, 105). They never observed Mr. Nance with a weapon (TR, p. 91, 107).

Officer Rix ordered Mr. Nance from the vehicle, patted him down and found nothing (EH, pp. 16, 38-39). He then sent Mr. Nance to the rear of the vehicle for Auxiliary Officer Rose to watch him (EH, pp. 17, 39). Officer Rix then ordered Goodwin from the vehicle, patted him down and found no weapons (EH, pp. 17, 40-41). He did find that Goodwin was carrying $566.00 in cash and a beeper (EH, pp. 17-18, 41). Officer Rix ordered Goodwin to the rear of the vehicle with Officer Rose and Mr. Nance. By this time, a back-up unit had arrived and two more officers supervised Mr. Nance and Goodwin at the rear of the Renault (EH, pp. 19, 42). Goodwin described how he and Appellee were "surrounded by police" and "spread-eagle" against the police

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car (EH, p. 60). Officer Rix then proceeded to search the Renault (EH, p. 42). He found nothing in the passenger compartment of the car but discovered that the glove box was locked (EH, p. 19). When he was unable to find the key to the glove box on the key ring and when Mr. Nance and Goodwin advised him that they did not have the key, the officer retrieved a screwdriver from his patrol car and pried open the glove box (EH, pp. 19-20, 42-43). Mr. Nance and Goodwin were arrested when the officer discovered two guns in the glove compartment (EH, p. 20). Subsequent fingerprint testing of the guns revealed "no identifiable latent prints" (TR, p. 96). During a strip search at the police station, the police purportedly found the key to the glove box in Mr. Nance's clothing (EH, p. 23).[2]

Prior to trial, Mr. Nance's counsel filed a Motion to Suppress, arguing both that the stop was illegal, based upon the pretext of a traffic violation, and that the subsequent search of the vehicle, in particular the search of the glove compartment, was unlawful. The trial court denied Mr. Nance's Motion to Suppress, and Mr. Nance was subsequently convicted and sentenced for carrying a pistol in a vehicle. A unanimous panel of the Michigan Court of Appeals reversed Mr. Nance's conviction in an opinion dated April 3, 1992, citing Michigan v. Long, supra. The Michigan Supreme Court denied Petitioner's application for leave to appeal in an order dated October 27, 1992. Petitioner now seeks a writ of certiorari from this Court.

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[2] Mr. Nance contends that the key the officers found was his house key, not the key to the glove box.

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SUMMARY OF THE ARGUMENT

The Michigan Court of Appeals properly reversed Respondent's conviction. Based upon the facts of this case, as elicited at the suppression hearing, the evidence available to the police at the time of the search was insufficient for them to formulate a reasonable belief, based on specific and articulable facts, that Mr. Nance was armed and dangerous.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE STANDARD SET FORTH IN MICHIGAN v. LONG, 462 US 1032 (1983), REQUIRED THE SUPPRESSION OF EVIDENCE THAT WAS THE FRUIT OF AN ILLEGAL SEARCH

Both the Michigan and the United States Constitutions protect persons from unreasonable searches and seizures. U.S. Const, Am IV; Mich Const 1963, art 1, Sec. 11. As the Michigan Court of Appeals recognized, the prevailing rule regarding warrantless automobile searches was articulated by this Court in Michigan v. Long, 463 US 1032, 1051; 103 SCt 3469; 77 LEd2d 1201 (1983):

> "[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." (emphasis added)

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In a footnote to the above-quoted language in Long, this Court expressed, "We stress that our decision does not mean that the police may conduct automobile searches whenever they conduct an investigative stop. . . " supra, footnote 14 (emphasis in original). Instead, "officers who conduct area searches during investigative detentions must do so only when they have the level of suspicion identified in Terry [v Ohio, 392 US 1; 88 SCt 1868; 20 LEd2d 889 (1968)]" supra.

The "level of suspicion" set forth in Terry, supra, is that a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" supra, 392 US 27. As rephrased by this Court in Long, the issue is whether the officer conducting the search "possess[es] an articulable and objectively reasonable belief that the suspect is potentially dangerous" supra.

Michigan courts have addressed this issue in a variety of factual circumstances. The fact that a suspect is standing with another person who is armed creates a reasonable belief of danger. In People v Harris, 164 Mich App 567, 417 NW2d 502 (1987), this Court held that the decision whether or not to suppress evidence depended upon a factual finding of whether the defendant was standing with another man who was carrying a shot-gun or whether he was, as he contended, 40-50 feet away. Proximity to an armed man would give police an "articulable and objectively reasonable belief" that the defendant was potentially dangerous.

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The fact that officers hear gunshots in the immediate vicinity in which they see a suspect gives them an "articulable and objectively reasonable belief" that the suspect is potentially dangerous and justifies their Terry search of him. In People v Payton, 166 Mich 428, 421 NW2d 191 (1988), officers on routine patrol heard gunshots and saw the defendant ducking between two buildings. In upholding the officers' subsequent Terry search of the suspect, the Michigan Supreme Court wrote:

> "Defendant was seen fleeing the immediate vicinity of the shots by the police officers. We believe the officers were justified in stopping Defendant, and, having heard shots, it was reasonable to conclude that the person with whom they were dealing may have been armed and dangerous. We distinguish this case from those in which a defendant flees upon seeing a police car and the police stop and frisk the individual for no other reason than his flight. People v Chesternut, 157 Mich App 181, 183-184; 403 NW2d 74 (1986), lv den 428 Mich 874 (1987)." Supra, p. 431.

An informant's tip regarding a weapon may also give the police justification for a weapon search. In People v Van Diver,[3] 140 Mich App 484, 364 NW2d 357 (1985), the police received information that a man matching the defendant's

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[3]In its Petition, Plaintiff erroneously identifies Van Diver as a case "analogous" to the present matter. In truth, the material facts of that case are completely different from those in the present case so that different results are mandated. It appears that Appellant cites Van Diver solely because the result in that case is consistent with the result that Appellant now requests. As any first year law student knows, however, such outcome-specific arguments are worthless. It is the reasoning behind the decision which is important, and the reasoning in Van Diver completely supports the Court of Appeals' decision in this matter. There is certainly nothing in Van Diver which is inconsistent with the Court of Appeals' decision.

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description and driving a car just like the defendant's in the vicinity of where the defendant was found had threatened another man with a gun. A witness pointed the defendant's car out to police a few minutes after the alleged threat and identified it as the vehicle involved in the incident. Upholding the subsequent search of the automobile, this Court wrote:

> "[T]he officers possessed an articulable and objectively reasonable belief that Defendant was potentially dangerous. At the time Defendant was stopped, the police had a reasonable belief that Defendant had a gun in his possession and had threatened the life of the person he was fighting with at the drug store. . . . The officers witnessed Defendant placing something in the glove compartment prior to exiting from the vehicle. The officers stopped Defendant for questioning and searched the glove compartment based solely upon their belief that Defendant had a dangerous weapon." Supra, pp. 488-489.

In addition, when one weapon is in plain view, police may conduct a search to determine if other weapons are present. In People v Blackburne, 150 Mich App 156, 387 NW2d 850, lv app den 425 Mich 869 (1986), for example, this Court observed:

> "The police officer, in conducting a pat-down [Terry] search, must have reasonably concluded that the persons with whom he is dealing may be armed and dangerous based on specific, articulable, reasonable inferences drawn from the facts."

Since the officers who conducted the search of the defendant's automobile did so only after observing a knife on the floor of the car in plain view, the more thorough search of the entire passenger compartment was lawful. When the officers discovered a gun on the passenger sitting nearest the knife, their subsequent

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pat-down search of the back-seat passengers was also justified. The officers had "specific, articulable grounds for conducting pat-down searches." Supra, p. 164.[4]

When there is no objectively reasonable grounds for the police to believe that a suspect is armed and dangerous, however, Michigan courts have, consistent with Michigan v. Long, ruled searches unlawful. In People v Parham, 147 Mich App 358, 382 NW2d 786 (1985), lv app den 425 Mich 862 (1986), the defendant was pulled over for a traffic violation. The officer requested that the defendant exit the vehicle and conducted a pat-down [Terry] search of the defendant "as a general precautionary measure." This Court wrote:

> "[W]e are mindful of the public interest in not requiring police officers to take unnecessary risks in the performance of their duties. Terry v Ohio, supra, pp. 26-27. However, assessment of the reasonableness of police conduct depends on a balance between this public interest and the individual's right to personal security free from arbitrary interference by law officers. Pennsylvania v Mimms, [434 US 106; 98 SCt

[4]See also People v Gewarges, 176 Mich App 65, 439 NW2d 272 (1989), where the officers conducted a search of a vehicle after seeing a hammer with one end sharpened in plain view. The presence of a "sharpened tool" with "no apparent legitimate purpose" gave the officers justification to search for further weapons. Gewarges is the other allegedly "analogous" decision upon which Appellant relies in its Application. However, like Van Diver, Gewarges is factually dissimilar from the present case in very material ways. There is absolutely nothing in the reasoning in Gewarges which is at all inconsistent with the Court of Appeals' decision in the present matter.

330; 54 LEd2d 331 (1977)].[5] Having applied this balancing test, we are convinced that police should be required to employ such other less intrusive measures as may be available for their own safety." Supra, pp. 361-362. (emphasis added) (footnote added)

In other words, the officers had no objectively reasonable grounds for believing that the defendant was armed and dangerous, so their search of his person was unlawful.

The facts and circumstances of the search in the present case are even more egregious than those in Parham, supra. Although they had no objectively reasonable grounds to believe that Appellee was armed and dangerous, the officers here not only patted-down Appellee and his companion, but also thoroughly searched the vehicle which Appellee was driving and forcibly opened a locked glove compartment. According to the officer's own testimony, what he witnessed prior to this search was a man[6] enter a vehicle[7], sit in that car for a few minutes[8], leave that car and enter another, and then drive away at an allegedly

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[5]In Mimms, supra, the pat-down search of the defendant was found justified because the officers observed a large bulge in his coat when he was asked to exit his vehicle. The bulge gave the officers reason to suspect that he was armed and dangerous.

[6]Goodwin was a black man in a predominantly white neighborhood.

[7]The vehicle was apparently legally parked at a party store during store hours.

[8]The officer admittedly "couldn't tell what they were doing" in the Sazuki (EH, p. 10).

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excessive speed[9]. In light of these observations, the search in this case clearly exceeded the boundaries of any conceivable lawful search.

The Michigan Court of Appeals specifically recognized that the test articulated in Michigan v Long controlled in this case, writing:

> "In Michigan v Long, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), the United States Supreme Court held that when an officer has a reasonable belief that a suspect is dangerous and may have access to weapons, the officer may search the passenger compartment of the suspect's vehicle. The officer's belief must be based upon specific and articulable facts and rational inferences arising from those facts." (emphasis added)[10]

The Court of Appeals proceeded to conclude that, in this case, it was not objectively reasonable for the officer to jump to the conclusion that he had just witnessed a drug deal and that Appellee would be armed. It summarized the facts as follows:

> "The only evidence upon which the officer based his theory that there was contraband in the car was that he had seen defendant and a driver pull into a parking lot and that the driver had entered the passenger compartment of another vehicle and conversed briefly with someone. The driver then looked up, saw the officer, seemed

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[9]The officer neither paced the vehicle nor clocked its speed on radar (EH, pp. 11, 35, 39).

[10] Petitioner's assertion on page 14 of its Petition that the Court of Appeals did not apply the proper standard is baseless; on the contrary, the Court of Appeals restated that standard verbatim. The Court of Appeals concluded, however, that the facts in this case did not satisfy that standard.

> startled, and 'jogged' back to his car. The driver entered the passenger's side of the car, and defendant began driving. The officer testified that defendant left the parking lot at a high rate of speed. The officer pulled the two men over, and as he was approaching the car, heard what he believed was the sound of a glove box closing. When the officer asked about the glove box, defendant's companion denied having a key to it and appeared nervous." (see Court of Appeals decision dated 4/3/92).

This, the Court of Appeals rightly concluded, was insufficient to give the police reasonable belief that the car contained contraband and/or weapons.

CONCLUSION

In short, the circumstances of this case were such that the officer who conducted the search could not have formed "an articulable and objectively reasonable belief" that Appellee was armed and dangerous. As such, his pat-down of Appellee, his subsequent search of the passenger compartment of the vehicle, and his forced entry and search of the glove box were unlawful. The evidence obtained as a result of those unlawful searches should have been suppressed at trial. The Court of Appeals' conclusion to this effect was not inconsistent with this Court's decision in Michigan v. Long. On the contrary, it would have been inconsistent with Michigan v Long for the Michigan courts to have ruled otherwise. The Court of Appeals recognized this and acted properly in rectifying the trial court's error.

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RELIEF REQUESTED

Based upon the foregoing, Respondent Vinson Maurice Nance respectfully prays that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully Submitted,

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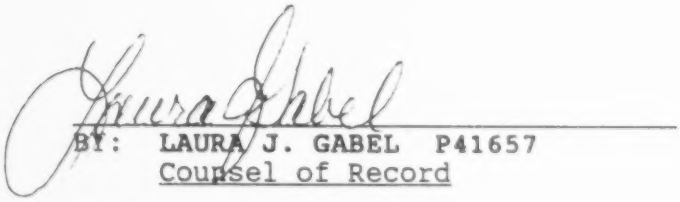

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